IN THE HIGH COURT OF HIMACHAL PRADESH SHIMLA

Criminal Appeal No.277 of 2003.

Judgment reserved on: 6.3.2007

Date of decision:18.04.2007

Sabal Singh alias Nagadev Giri .....**.Appellant**

Versus

State of H.P. **..Respondent**

Coram

The Hon'ble Mr.Justice Surjit Singh, J.

The Hon'ble Mr. Justice Dev Darshan Sud, J.

Whether approved for reporting ?[1]

For the Appellant : Mr. Anup Chitkara, Advocate.

For the respondent : Mr. S.D. Vasudeva, Addl. A.G. with Mr. D.S. Nainta, Dy. A.G.

Per Dev Darshan Sud, J.

This appeal has been filed by the appellant who has been convicted and sentenced for offence under Section 20 of the Narcotic Drugs and Psychotropic Substances Act, 1985 (here-in-after referred to as the "Act").

The prosecution case in brief is that on 28.3.2002, PW-5 SI Balwant Singh alongwith ASI Gian

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[1] *Whether the reporters of Local Papers may be allowed to see the judgement*?

Chand, HC Krishan Chand, Constable Uttam Chand, (PW-1), Constable Tek Chand PW-4) and one lady constable Haradei was present near Pagal Nallah. The police party spotted a Baba coming from Sainj side towards Larji. When he reached near the spot where the police party was standing, he started displaying signs of nervousness. This raised suspicion in the mind of the police party and, PW-5, SI Balwant Singh over powered him. On enquiry it was disclosed by the Baba that he was Sabal Singh. The prosecution story further is that PW-5 told the appellant that he might be in possession of some contraband (Charas) and as such, gave him option to be searched before a Magistrate or Gazetted officer, vide memo Ex.PW-4/A. The appellant agreed to be searched by the police. The prosecution has alleged that all the legal requirements under the Act were complied with before the bag which the appellant was carrying was searched. It was found that the bag contained Charas weighing about 3 Kg.

Out of the recovered Charas two samples of 25 grams each were separated which were packed and sealed with seal-H. The remaining Charas alongwith the bag was also separately packed and sealed with the same seal impression. NCB forms Ex.PW-5/A were filled in triplicate and seal impression Ex.PW-4/C

was retained. The contraband was taken into possession vide seizure memo Ex.PW-4/D and a copy supplied to the accused. The prosecution case further is that the appellant was apprised of the offence committed by him and the punishment which he would undergo and this fact has been recorded in memo Ex.PW-4/E.

SI Balwant Singh (PW-5) sent a ruka Ex.PW-2/B through constable Tek Chand for registration of the case to Police Station Banjar where, HC Sandeep Kumar (PW-2) recorded FIR Ex.PW-2/A and after making an endorsement on the ruka sent the file to the Investigating Officer through the same constable. The other facts alleged are that the site plan Ex.PW-5/A was prepared on the spot and the statements of the witnesses were recorded. On return to the Police Station, PW-5 deposited the case property with MHC Sandeep Kumar who entered the same in the malkhana register as Ex.PW-2/D.

A sample of the seized contraband was sent to the CTL Kandaghat vide Road Certificate, Ex.PW-2/E through PW-1 constable Uttam Singh. The Chemical Examiner gave his opinion vide Ex.PW-5/C stating that the seized contraband was Charas. The Special report etc. was also prepared and sent to the Dy. S.P. It is undisputed that on 1..5.2002, SI Balwant Singh made

inventory Ex.PW-5/E of seized Charas and made an application Ex.PW-5/D under Section 52(2) of the Act in the Court of learned ACJM, Kullu where the case property was produced for inspection. Vide order dated 1.5.2002 Ex.PW-5/F, the court ordered that the packets be sealed and one representative sample of 25 grams which separately taken as case property. The case property thereafter was returned to the MHC Police Station, Banjar.

The learned Special Court came to the conclusion that the appellant was in conscious possession of Charas and therefore, sentenced him to undergo rigorous impression for 10 years and to pay fine of rupees one lac. In default of payment of fine, the appellant was further sentenced to imprisonment for six months. The period of detention already undergone by the appellant was ordered to be set off against the sentence awarded.

Learned counsel for the appellant has submitted that the documents produced in evidence by the prosecution have been tampered with. There is no evidence to show or link the accused with the seizure of the contraband. He submits that these facts can be ascertained from the record. Reading of various documents would show that the date has been altered and the evidence of the prosecution itself shows that

the identity of the contraband has not been established.

On the first point, the learned counsel has submitted that the alleged search and seizure is shown to have taken place on 28.3.2002 but the documents do not establish these facts. He has drawn our attention to Ex.PW-4/D Recovery memo, Ex.PW-4/E Arrest memo, Ex.PW-3/C, Copy of Special Report and Ex.PW-2/D, copy of malkhana register. He has pointed out that all these documents have been tempered with. The date has been altered from 27 to 28 (the figures have been written in the Devnagri script) Learned counsel submits that digit 7 has been altered to 8. He seeks to substantiate the submissions by relying upon the fact that there was no report with the police and Ex.PW-2/F was prepared on 27.3.2002. No explanation has come forth with respect to this tempering of documents. He has also invited our attention to Ex.PW-4/B memo of personal search in which there was a 3-4 inches gap between the last line and the signature of the appellant and the witnesses.

On the second point urged by learned counsel, he has drawn our attention to the fact that the sample which was sent for analyses was not connected with the stuff allegedly seized from the

appellant. According to him application Ex.PW-5/D accompanied by inventory Ex.PW-5/E was moved under the provisions of Section 52A (2) of the Act. Ex.PW-5/E, copy of order passed by learned Chief Judicial Magistrate and Ex.PW-5/G the certificate issued by him have not been explained. Learned counsel has pointed out that in all these proceedings there is contradiction regarding the date of sample, the number of the sample and the source from where the sample was produced and the police official to whom it was handed over. These contradictions according to him are unexplained.

We have heard the matter at length and have considered the matter in detail. We had ordered the then Chief Judicial Magistrate who had furnished the certificate under the provision of Section 52A (2) of the Act needs to be examined in order to explain the contradictions appearing on the record. Accordingly, his statement was recorded as Court witness on 3.1.2007.

On 22.4.2002, an application (Ex.PW-5/D) under Section 52A, Sub Section (2) of the Act was submitted before the Chief Judicial Magistrate in which permission was sought for photographs of the seized Charas to be taken in the presence of the Court. A prayer was also made that the case property

should be allowed to be disposed of in accordance with law. The order sheet recorded that the application had been presented by Balwant Singh, SHO. Notice of the application was given to the Assistant Public Prosecutor. Ex.PW-5/E which is the inventory of case property seized from the appellant states that the quantity of the Charas seized was 3 Kgs. and two samples of 25/25 grams were prepared and one sample sent to the CTL Kandaghat.

In the order Ex.PW-5/F, it has been recorded that one big parcel weighing 2.975 grams and two small parcels weighing 25 grams each were produced by HC Narain Singh, Incharge Malkhana, Police Station. According to the order, all the three packets namely big and small were opened and mixed properly and one representative sample of 25 grams was separately taken from the case property and the sample packet of 25 grams and the remaining contents were separately packed and sealed with four seals. These were then handed over to HC Narain Singh of Police Station, Kullu. Certificate Ex.PW-5/G recorded that two white cloth parcels were produced by HC Narain Singh and after verifying both the packets big containing 2.975 grams Charas and small containing 25 grams Charas were opened and mixed properly.

Both the packets were separately weighed in the presence of the Court and sealed with four seals of "CJM L/S"bearing the signature and date of the Court. The certificate records "thereafter the big packet and the representative sample packet of 25 grams to be retained as case property returned to the MHC P.S. Banjar and the seal was handed over to some official of this Court". It was noticed that far from recording the proceedings correctly, contradictory observations have been made and orders passed. The learned Chief Judicial Magistrate was asked to explain the contradiction with regard to the number of the packets produced, the weight of the contraband, and the police official by whom it was produced and to whom it was returned. Ex.PW-5/F which is the order passed by him on 1.5.2002 was shown to him. It is a carbon print containing blanks filled in hand. He was asked to explain contradictions between Ex.PW-5/E which referred to only two parcels and the contradiction in the weight. The question put to him was in the following terms:-

> ***"Q.No.6: The order (copy Ex.PW-5/F) passed by you on 1.5.2002, on the aforesaid application, which is in the nature of a carbon print and some blanks left therein are filled in hand, shows that three sealed parcels, one big containing 2.975 Kgs. And two small parcels, being samples, each weighing 25 grams were produced before you by HC Narain Singh No.34, Incharge***

Malkhana, Police Station, Kullu, whereas, according to the inventory Ex.PW-5/E, only two parcels, one big containing 2.950 Kgs. Of Charas and one containing small parcel weighing 25 grams of Charas and one containing small parcel were there. How would you explain this contradiction?

Answer: - The order was typed on my dictation, in triplicate because one part was to be sent to the Special Judge, one was to be handed over to the Police and one was to be retained in the record of my Court. In fact, three parcels, as mentioned in the order Ex.PW-5/F, were produced before me and not just two, which are mentioned in the inventory Ex.PW-5/E. I got unsealed/opened all the three parcels and then took out one representative sample, which was sealed with the seal of the Court"

Again, it was brought to his notice that vide Ex.PW-5/G the certificate Ex.PW-5/G issued by him under the Act, it was recorded that two parcels were opened and its contents were mixed while his order Ex.PW-5/F states that there were three parcels. He was unable to explain the contradiction in the certificate and the order passed by him. His answer was that there may be some mistake. He was persistently questioned by us about the discrepancies. He was asked that vide Ex.PW-5/F, SHO Balwant Singh of Police Station, Banjar and HC Narain Singh, Incharge, Malkhana Sadar Kullu and Shri H.S. Verma, APP were present when the proceedings were conducted, however, in Ex.PW-5/G it was mentioned that the case property was handed over

to the MHC Police Station, Banjar, how and under what circumstances this had been done. Again his answer was that this has been wrongly recorded by mistake.

After considering the evidence in detail, we find that the submissions of the learned counsel for the appellant that the record itself shows that there are contradiction regarding the number of parcels, and their weight, which were produced before the learned Chief Judicial Magistrate are correct. Prosecution has not been able to reconcile why the parcels containing the bulk and the samples which were produced by the SHO Balwant Singh, P.S. Banjar and HC Narain Singh, Incharge Malkhana Police Station Sadar Kullu, has been handed over to the MHC Police Station Banjar who was not even present on the date when the proceedings was conducted. All these facts create a serious doubt as to whether the samples produced in the Court were the same which were seized from the appellant. The certificate Ex.PW-5/G did not authorize the destruction of the contraband, but the same was not produced before the Court during trial. We are told that it had been destroyed. Under what circumstances this was done is not clear. PW-5 Balwant Singh, S.I., Incharge, Police Post, Akhara Bazar, Kullu has stated in his

cross examination that he was present at the time of destruction of the case property. According to him, the bag alongwith the Charas was also destroyed and this was done as per orders of the Court. To the suggestion that there was no such Court order, he has stated that such an order exists. We find this to be contrary to the record of the Court. Ex.PW-5/G which is the certificate does not authorize such destruction. It is therefore, very doubtful as to whether the contraband was seized by the police or not.

Learned counsel for the appellant has drawn our attention to Ex.PW-4/A memo of personal search, Ex.PW-4/D Recovery memo, Ex.PW-4/E Arrest memo, Ex.PW-3/C, copy of Special Report and Ex.PW-2/D, copy of malkhana register. It is clear from a bare look that the date on these documents has been over written and changed from 27 to 28. There is no explanation for the same. This casts a serious doubt whether the recovery has been actually effected or not. In the totality of the circumstances, we hold that the prosecution has not been able to establish its case beyond reasonable doubt.

Learned counsel for the appellant has drawn our attention to judgment *Sachin Sharma Vs. State of H.P. Latest HLJ 2005 (HP) 1102*. Learned

counsel has submitted that the contraband purporting to have been seized from the appellant has not been produced before the court and the certificate which has been issued does not connect the accused with the contraband. Therefore, appellant cannot be convicted of the offence. We find substance in the submissions of the learned counsel. The parcel containing the bulk Charas was not produced in the Court. The case property is the primary evidence to substantiate the charge. Further, contradictions in the order regarding the number of parcels, their weight, and the police officials who produced the samples of the Charas leave no doubt in our mind that the prosecution has not been able to connect the contraband with the report of the Chemical Examiner. It is strange that the Magistrate before which the contraband was produced, had acted in the manner as observed above, without considering the fact that it was discharging judicial functions. Learned Magistrate should have realized the seriousness of the proceedings and the statutory obligation cast upon him under Section 52A of the Act to have kept authenticate record of the judicial proceedings. He is not to be told as to how the judicial proceedings are to be recorded. Error in applying case law may be

tolerated, but recording wrong and contradictory facts while discharging judicial functions can not be accepted. To say the least, we are anguished that the contradictions which are material in nature should be explained away by the stock answer that they have occurred by mistake. Surely, the learned Presiding Officer was alive to the seriousness of the situation.

Learned counsel submits that the facts of the present case are similar to those reported in the judgment *in Sachin Sharma's case* (supra). He has drawn our attention to para-8 of the judgment which is reproduced hereunder:-

> **"*Admittedly, the case property i.e. parcel containing the bulk Charas was not produced in the Court. The case property itself was the primary evidence to substantiate the charge of recover of Charas from the appellant. There is an exception to the production of case property. Section 52-A of the Narcotic Drugs and Psychotropic Substances Act, which has been incorporated vide Act 2 of 1989 provides vide sub-section (4) that where a Magistrate has certified the inventory, or the photographs of the stuff or any list of sample drawn in the presence of the Magistrate to be correct, the same is to be treated as primary evidence in respect of the offence. No doubt the prosecution has produced a certificate (Ex.PW-7/F) issued by the learned Chief Judicial Magistrate, Lahaul & Spiti alongwith the zimini order Ex.PW7/J passed by the said Chief Judicial Magistrate on the application under Section 52-A of the Narcotic Drugs and Psychotropic Substances Act, whereby it***

> ***has been certified that a representative sample had been drawn from a sealed parcel bearing seal impression 'H' and 'B' containing 1.175 kilograms Charas and two other parcels containing 25 grams Charas each, but the certificate and the order do not stand connected with the case property of this case."***

In the present case we also find that the case property and certificate are not connected with the accused.

Before parting with the case we must express our consternation and deep sense of anguish at the manner in which the proceedings were conducted by the learned Chief Judicial Magistrate. To our persistent questions with respect to the contradiction in the order and the documents referred to by us, no satisfactory answer has been given. We are sure that the learned Magistrate was conscious of the fact that he was conducting judicial proceedings. It was his duty to ensure that because of some lapse or lack of seriousness on his part, the case of the prosecution does not fail. The casual manner in which the proceedings have been conducted deserves to be deprecated.

The facts set out above raise a very serious doubt as to the recovery; whether it has been made or not, whether the appellant can be connected with it. In the totality of the circumstances, we

hold that the prosecution has not been able to establish its case beyond reasonable doubt. Hence, this appeal is accepted and the judgment of trial Court convicting and sentencing the appellant for offence under Section 20 of the Act is set aside and he is acquitted of the charge. He shall be set at liberty forth with, in case he is not wanted in any other case.

(Dev Darshan Sud)
Judge

(Surjit Singh)
Judge

April 18,2007(sks/PC).

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Sabal Singh alias Nagadev Giri ……..**Appellant**

Versus

State of H.P. …..**Respondent.**

Judgment for consideration, please.

(Dev Darshan Sud), J.

I agree / do not agree.

(Surjit Singh), J.

List for judgment on .

(Dev Darshan Sud), J.

Court Secretary.